Supreme Court, U.S.
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In The

Supreme Court of the United States

ALBERT ALFRED EGGERT,

Petitioner,

v.

CALVIN REMINGTON, VENTURA COUNTY CHIEF PROBATION OFFICER, AND STEVE HOLL, SUPERVISING PROBATION OFFICER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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In Propria Persona

40 pp

QUESTIONS PRESENTED

This case concerns a warrantless DUI arrest, initiated by a member of the California Highway Patrol, despite his admitted failure to observe any criminal conduct which would have provided probable cause for the traffic stop. Petitioner was subjected to a forcible seizure of his blood, incarceration, and still remains in constructive custody.

Petitioner's dismissal motions were denied by the trial court, despite the fact that the District Attorney's Office had failed to timely file a formal complaint, and that the complaint which was filed was statutorily insufficient.

Petitioner was tried and convicted in a court trial of driving under the influence, even though the prosecutor had failed to enter into evidence certified copies of the defendant's DMV record. As a result, the People never even attempted to show, that the "implied consent" rule could have been properly applied in this case.

1. May a CHP Officer make a warrantless DUI arrest when, in so doing, he violates the California Vehicle Code and when he has observed no criminal conduct committed in his presence?

2. Did the District Attorney's failure to timely file a legally sufficient formal complaint deprive the trial court of jurisdiction?

3. Does California's "Implied Consent Law" provide for the forcible seizure of a motorist's blood in the absence of a driver license granting consent and waiving one's Fourth and Fifth Amendment rights?

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OPINIONS BELOW

The Court Of Appeal's denial of Petitioner's request for a certificate of appealability was filed on June 4, 2003, and is attached as Appendix A.

The Central District Court of California's Order denying Petitioner's Petition for a Writ of Habeas Corpus was filed on August 12, 2002, and is attached as Appendix B.

STATEMENT OF JURISDICTION

On June 4, 2003, the Court of Appeal denied Petitioner's request for a Certificate Of Appealability from the Central District's adverse ruling denying him a Writ of *Habeas Corpus*. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except

in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The undisputed facts as recorded in the official court transcript reflect the following: on 14 August 1999, Petitioner and California Highway Patrol Officer Jason McEwen were traveling in opposite directions on Harbor Blvd. in Oxnard, California at 1:00 a.m. According to McEwen's sworn testimony he observed, in his rearview mirror (!!), that Petitioner's automobile was three feet over the double yellow line. The two automobiles were traveling at a combined separation speed in excess of 100 mph. McEwen testified that he reversed direction, observed Petitioner Eggert drive partially on the shoulder and then effected a

traffic stop by activating his overhead emergency red light and pulling the motorist to the side of the road.

Eggert was subsequently transported to Ventura County Medical Center in handcuffs, forcibly pinned to a gurney by several officers while a blood draw was performed by hospital nurse Karen Bateman. Eggert was then incarcerated, arraigned, tried and convicted of driving under the influence, despite the laundry list of due process violations, which are detailed below. He remains in constructive custody.

REASONS FOR GRANTING THE WRIT

This Petition allows the Court an opportunity to assert that a California Peace Officer violates a motorist's right to equal protection and due process by making a warrantless arrest for alleged civil infractions, and by instigating a forcible blood draw absent implied consent. This Court is also presented with an occasion to reaffirm that a trial court lacks jurisdiction to proceed absent a timely and legally sufficient formal complaint, and that a constitutionally impermissible abuse of discretion takes place when the trier of fact allows evidence of blood alcohol content despite the prosecution's failure to enter into evidence proof of the possession of a California Driver License to show implied consent.

WARRANTLESS CIVIL ARRESTS ARE UNLAWFUL

California law requires that before a motorist may be required to submit to the so-called "implied consent law,"

the arrest must be lawful. See Vehicle Code (VC) § 23612(B). Thus, if the traffic stop were shown to be unlawful, forcible blood seizure would be a violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. *People v. Eggert* provides a classic example of denial of due process, from beginning to end.

Officer McEwen, a California Peace Officer pursuant to Penal Code § 830.0 *et seq.*, is authorized by the Legislature to enforce the law:

> "830.2. The following persons are peace officers whose authority extends to any place in the state:
> (a) Any member of the Department of the California Highway Patrol. . . .
> The authority of these peace officers extends to any place in the state, as follows: (1) As to any ***public offense*** committed or which there is probable cause to believe has been committed within the political subdivision that employs the peace officer or in which the peace officer serves. (Emphasis added.)

Public offenses are crimes, but infractions are not. Infractions are civil in nature because, in California, no one charged with an infraction is entitled to trial by jury, or to a public defender at the taxpayers' expense. Nor may he be incarcerated if found guilty. Most importantly, the California Constitution guarantees all criminal defendants the right to trial by jury. Since there is no such thing as jury trial for infractions, they cannot be criminal. They must then be civil. See California Code of Civil Procedure § 24, **Kinds of actions, civil and criminal.** See also *USA v. Colin,* No. 01-50140, D.C. No. CR-99-01212, MMM-02 (9th Cir., 2002).

Violations such as crossing the double yellow line and traveling on the shoulder, if they happened at all, would be infractions. Thus, Officer McEwen abused his authority to make such a stop because his authority is specifically limited to criminal violations. See *People v. Battle*, 50 Cal. App. 3d (1975).

Indeed, the California Legislature has provided specific and unmistakable guidelines for peace officers making traffic stops:

> VC §40300. The provisions of this chapter **shall govern all peace officers in making arrests for violations of this code** without a warrant for offenses committed in their presence, but the procedure prescribed herein shall not otherwise be exclusive of any other method prescribed by law for the arrest and prosecution of a person for an offense of like grade. Emphasis added.

In other words, all traffic stops must conform to the dictates of this section of the Vehicle Code, unless an officer relies upon some other Code, such as the Penal Code, in order to make the stop. Such does not apply in the instant case.

> 40300.5. In addition to the authority to make an arrest without a warrant pursuant to paragraph (1) of subdivision (a) of Section 836 of the Penal Code, a peace officer may, without a warrant, arrest a person when the officer has reasonable cause to believe that the person had been driving while under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug when any of the following exists:

(a) The person is involved in a traffic accident.
(b) The person is observed in or about a vehicle that is obstructing a roadway.
(c) The person will not be apprehended unless immediately arrested.
(d) The person may cause injury to himself or herself or damage property unless immediately arrested.
(e) The person may destroy or conceal evidence of the crime unless immediately arrested.
40300 6. Section 40300.5 shall be liberally interpreted to further safe roads and the control of driving while under the influence of an alcoholic beverage or any drug *in order to permit arrests to be made pursuant to that section within a reasonable time and distance away* ***from the scene of a traffic accident.*** Emphasis added

Clearly, none of the subsections applies because there was never a traffic accident. In fact, it is this very distinction which separates *People v. Eggert* from cases such as *Schmerber v. California,* 384 U.S. 757 (1966). Neither *Schmerber* nor any other case of which Petitioner is aware has addressed the issues of peace officers making warrantless civil arrests, or ignoring § 40300 *et seq.* in order to effect unlawful DUI arrests. Because the traffic stop violated clearly defined state law, both it and the arrest should have been ruled unlawful.

THE TRIAL COURT WAS COMPLETELY BEREFT OF JURISDICTION

California law requires that, prior to an entry of plea, a criminal defendant be presented with a timely filed,

legally sufficient formal complaint. Petitioner was deprived on all counts. Absent a properly verified (i.e. sufficient) complaint, the court lacks jurisdiction to proceed. See *Anger v. Municipal Court of the City and County of San Francisco*, 237 Cal. App. 2d 69 (1965). See *also Gavin v. Municipal Court,* 184 C.A.2d 712, 7 Cal Rptr. 722 (1960). *Rupley v. Johnson,* 120 C.A.2d 548, 261 P.2d 318 (1953).

In the instant case, the formal but *unverified* complaint was filed 26 days after Eggert's arrest and incarceration. § 853.6(e)(3) also provides:

> The failure by the prosecutor to file the notice or formal complaint within *25* days of the time of the arrest shall not bar further prosecution of the misdemeanor charged in the notice to appear. However, any further prosecution **shall be preceded by a new and separate citation or an arrest warrant.** Emphasis added.

Moreover, the complaint while formal was unverified and as such was insufficient. Petitioner had no obligation to plead to an insufficient complaint and the trial court's decision to force Eggert to trial over his objections was a gross abuse of discretion which deprived the court of jurisdiction.

> "VC §40513.(a) Whenever written notice to appear has been prepared, delivered, and filed with the court, an exact and legible duplicate copy of the notice when filed with the magistrate, in lieu of a verified complaint, shall constitute a complaint to which the defendant may plead "guilty" or "nolo contendere." If, however, the defendant violates his or her promise to appear in court or does not deposit lawful bail, or pleads other than "guilty" or "nolo contendere" to the offense charged, a **complaint shall** be filed that shall

> conform to Chapter 2 (commencing with Section 948) of Title 5 of Part 2 of the Penal **Code**, which shall be deemed to be an original **complaint**, and thereafter proceedings shall be had as provided by law, except that a defendant may, by an agreement in writing, subscribed by him or her and filed with the court, waive the filing of a **verified complaint** and elect that the prosecution may proceed upon a written notice to appear. (b) Notwithstanding subdivision (a), whenever the written notice to appear has been prepared on a form approved by the Judicial Council, an exact and legible duplicate copy of the notice when filed with the magistrate shall constitute a complaint to which the defendant may enter a plea and, if the notice to appear is verified, upon which a warrant may be issued. If the notice to appear is not verified, the defendant may, at the time of arraignment, request that a verified complaint be filed." Emphasis added.

Since the defendant has expressly reserved the entry of a plea pending the production of a verified complaint, we must now look to Penal Code § 959 to determine what constitutes verification:

> 3. If a complaint, that it is made and subscribed by some natural person and sworn to before some officer entitled to administer oaths.

Paragraph 3 is thus the standard by which verification must be measured. The record reflects no such verification because Eggert never entered a plea and Officer McEwen never bothered to verify the complaint as required by law. Thus, jurisdiction was lacking and the

People's case should have been dismissed, pending refiling as required by the Penal Code.

THE APPLIED CONSENT LAW IS INAPPLICABLE HERE

Vehicle Code (VC) § 13384(a) says:

> "The department (DMV) shall not issue or renew a driver's license to any person unless the person consents in writing to submit to a chemical test or tests of that person's blood, breath, or urine pursuant to Section 23612, or a preliminary alcohol screening test pursuant to Section 23136, when requested to do so by a peace officer."

Here we have the State's admission that consent is implied through application for and acceptance of a California Driver License. This rings true since it may not be assumed that one has waived his constitutional rights, the waiver must be explicit. The problem with *People v. Eggert* is that the District Attorney never entered Eggert's DMV record into evidence. Thus there is no admissible evidence that the Petitioner held a license which would have been a waiver, had it been introduced. For the record, Eggert held no such license. Arguably, given the *Nisi Prius* nature of the trial court, convicting him of anything absent admissible evidence in the record of licensure amounts to nothing less than an egregious abuse of discretion and denial of due process.

Additionally, VC § 23612(B), *inter alia,* makes clear that the implied consent rule applies only when a driver has been "lawfully arrested." As we have shown *supra,* the

arrest was unlawful because the officer violated § 40300 *et seq.* by arresting the Petitioner for a civil infraction, absent a warrant. Such an arrest is *ipso facto,* unlawful.

CONCLUSION

The Court will presumably use the *Schmerber* case as the template by which this case and others of its ilk should be judged. By that standard, Eggert's conviction must be overturned. A case is not authority for a proposition not contained.

In *Schmerber* there was a driver who had had a traffic accident, was hospitalized so that his self inflicted injuries might be treated and who was charged with a felony. The two cases are easily distinguishable. Eggert was not involved in a traffic accident, was not lawfully arrested and was not hospitalized for treatment of any injuries. Eggert has challenged the legality of his arrest from Day One, whereas Schmerber did not. We note here that even *Breithaupt v. Abram*, 352 U.S. 432, which preceded *Schmerber,* revolved around a driver who had been involved in an accident. We find no precedent, either state or federal, to support the proposition that a peace officer may arrest without a warrant on the basis of alleged civil infractions. California law specifically rejects such a concept in § 40300 *et seq.* Thus rendering the stop and the arrest unlawful.

In *Schmerber,* the Court found that:

> "It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold

> that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions."

That said, where can the justification for the arrest, blood seizure, incarceration and conviction of the Petitioner be found? Since the traffic stop was illegal, the arrest was as well. Absent a driver license, the blood seizure was illegal because **there was no consent, implied or otherwise.** We find no authority under state law or elsewhere for the proposition that a citizen may be held down forcibly while his blood is extracted to be used in court. True, the California Vehicle Code provides sanctions for the refusal to submit, but nothing we have found grants a peace officer the authority to coerce the evidence from a citizen's body.

Albert Alfred Eggert is a political activist, who has been both voluble and untiring in his efforts to publicize ongoing corruption in the Ventura County legal system. This arrest and the travails which have followed are, arguably, the system's way of playing "catch up." Twice before Eggert has been arrested for various DUI related charges. Twice before the cases have been dismissed, once because a county firefighter testified that the CHP officer who had arrested him was committing perjury on the stand. But the Petitioner keeps tilting at County windmills and the County continues to respond with baseless arrests and incarcerations. There may well have been alcohol in the blood that was introduced into evidence. But, if so, it was not blood taken from Eggert, who does not drink.

Petitioner respectfully requests that his conviction be reversed due to the insufficiency of the evidence, denial of constitutional due process, or upon such other grounds as may please the Court.

Dated: October 8, 2003

Respectfully submitted,

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In Propria Persona

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALBERT ALFRED EGGERT, Petitioner-Appellant, v. CALVIN REMINGTON, et al., Respondents-Appellees.	No. 03-55323 D.C. No. CV-02-02087-DDP (JTL) Central California (los Angeles) ORDER (Filed June 4, 2003)

Before: HUG and W. FLETCHER Circuit Judges.

Petitioner's request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2).

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ALBERT ALFRED EGGERT, Petitioner, v. CALVIN REMINGTON, et al., Respondents.	Case No. CV-02-2087-DDP (JTL) ORDER ADOPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all the records and files herein, and the Report and Recommendation of the United States Magistrate Judge. The Court concurs with and adopts the findings, conclusions and recommendations of the Magistrate Judge.

IT IS ORDERED that judgment be entered denying the Petition for Writ of Habeas Corpus and dismissing this action with prejudice.

DATED:_____

_____

DEAN D. PREGERSON
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALBERT ALFRED EGGERT, Petitioner, v. CALVIN REMINGTON, et al., Respondents.	Case No. CV-02-2087-DDP (JTL) **JUDGMENT**

In accordance with the Report and Recommendation of the United States Magistrate Judge filed concurrently herewith,

IT IS HEREBY ADJUDGED hat [sic] the Petition for Writ of Habeas Corpus is denied and this action is dismissed with prejudice.

DATED:_____

_____
DEAN D. PREGERSON
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALBERT ALFRED EGGERT, Petitioner, v. CALVIN REMINGTON, et al., Respondents.	) Case No.) CV 02-2087 DDP (JTL))) REPORT AND) RECOMMENDATIONS) OF UNITED STATES) MAGISTRATE JUDGE

The Court submits this Report and Recommendation to the Honorable Dean D. Pregerson, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 01-13 of the United States District Court for the Central District of California.

PROCEEDINGS

On March 12, 2002, Albert Alfred Eggert ("Petitioner") filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition"). On April 29, 2002, Calvin Remington and the other named Respondents ("Respondents") filed a Return to the Petition ("Return"). On May 14, 2002, Petitioner filed his Traverse to Respondents' Return ("Traverse").

Thus, this matter now is ready for decision.

BACKGROUND

On December 20, 1999, after a court trial at which Petitioner represented himself, Petitioner was convicted of one count of driving under the influence of alcohol or drugs (Cal. Vehicle Code § 23152(a) and one count of driving with

a blood alcohol content ("BAC") of .08 or higher (Cal. Vehicle Code § 23152(b)). (Return, Exh. 3). The judge found true the allegation that Petitioner had willfully and unlawfully refused to take a chemical test to determine his BAC (Cal. Vehicle Code § 23612). (*Id.*). The court sentenced Petitioner to five days in county jail with work release and three years probation. (Return, Exh. 1 at 10-12).

Petitioner did not appeal his conviction. Instead, Petitioner argued that the California court had acted without personal or subject-matter jurisdiction over his case and therefore his sole state remedy was via petition for writ of habeas corpus. Accordingly, Petitioner filed petitions for writ of habeas corpus in the California Superior Court, California Court of Appeal, and California Supreme Court. All three petitions were denied.[1] (Petition at 5; Return, Exhs. 17-18).

Petitioner filed this Petition on May 24, 2001.

SUMMARY OF THE EVIDENCE PRESENTED AT TRIAL[2]

On August 14, 1999, at approximately 1:00 a.m., Petitioner was driving on Harbor Boulevard in Ventura,

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[1] Respondents indicate that Petitioner filed "a plethora of pleadings" in state court, including "multiple petitions for writ of habeas corpus in the Superior Court" and pettitions [sic] for "certiorari" in all three courts. (Return at 3-4). However, Respondents have lodged only two state habeas petitions.

[2] No California court has set our findings of fact in Petitioner's case. The facts are taken from the transcripts.

California. (Reporter's Transcript ["RT"] at 37).[3] California Highway Patrol Officer Jason McEwen observed Petitioner swerve "approximately three feet over the double-yellow lines," drift back into his lane, and then over onto the shoulder. (*Id.*). Officer McEwen activated his forward-facing red light, but Petition [sic] did not stop. (*Id.*). The officer then activated his alternating "wig-wag" headlights, but Petitioner still did not stop. (*Id.*). Finally, the officer activated his emergency siren. Petitioner pulled over. (RT 37-38).

Officer McEwen went over to Petitioner's car and noticed that Petitioner's eyes were red and watery, and that he smelled of alcohol. (RT 38). Petitioner told the officer he had consumed two or three beers prior to getting in his car. (RT 142). Officer McEwen had Petitioner step out of the vehicle so the officer could administer a field sobriety test ("FST"). Petitioner fell down as he got out of his car, and Officer McEwen picked him back up. (RT 39). Petitioner stumbled against the car again as he accompanied Officer McEwen to the front of the car. Officer McEwen had Petitioner perform three FSTs, all of which Petition [sic] failed. (RT 42-44). He nearly fell over again performing the third one, and Officer McEwen decided to halt the testing out of fear for Petitioner's safety. (RT 44).

The officer arrested Petitioner and transported him to the California Highway Patrol station. Petitioner refused to take a breathalyzer test there. (RT 45, 70). Officer

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[3] The arresting officer testified that the incident took place on August 19. However, the police reports and misdemeanor Complaint all indicate the incident actually took place on August 14. (Return, Exhs. 2-3).

McEwen then took Petitioner to the hospital for a blood draw. Petitioner refused to give blood. (RT 48). Officer McEwen had a nurse draw Petitioner's blood without his consent. (RT 95-97, 145). The blood was tested in a government lab and found to have a BAC of .12. (RT 158, 160-61).

PETITIONER'S CLAIMS

1. Petitioner's right to a speedy trial under California Penal Code ("CPC") § 853.6 was violated when the criminal Complaint was filed one day late;[4]

2. The government's reliance on an unverified Complaint violated CPC § 959 and California Vehicle Code ("CVC") § 40513.

3. Petitioner was jailed without receiving *Miranda* warnings;[5]

4. The trial court improperly refused to take judicial notice of California and federal law;

5. The trial court improperly denied Petitioner's motion for recusal;

6. There was insufficient evidence of the special allegation in Count II (refusal to submit to chemical test);

7. Forcibly drawing blood from Petitioner violated Petitioner's Fourth and Fifth Amendment rights;

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[4] Petitioner has two different sets of claims numbered 1 through 4. The Court has renumbered Petitioner's claims for the sake of clarity.

[5] Petitioner later abandoned this claim. (Traverse at 20).

8. The officer failed to follow proper arrest procedures, in violation of CVC § 40300.5;

9. The California Superior Court denied Petitioner's petition for writ of habeas corpus more than 30 days after it was filed, in violation of the California Rules of Court, which denied Petitioner due process;

10. The California Court of Appeal and California Supreme Court "exacerbated the situation [in Ground Nine] by allowing that denial to stand");

11. "I have taken a writ of certiorari, as well as a writ of habeas corpus in every court in the State upon these same issues, and been denied each and every time."

(Petition at 6, 6a, 7).[6]

STANDARD OF REVIEW

The Court's consideration of Petitioner's claims is governed by the Antiterrorism and Effective Death Penalty Act of 1996. However, no California court has provided a written analysis of any of Petitioner's federal claims. Therefore, the Court must conduct an independent review of the record in order to determine whether the state court decision was unreasonable in light of clear Supreme Court precedent. *Greene v. Lambert*, 288 F.3d 1081, 1089 (9th Cir. 2002) (independent review of the record necessary when state courts provide "no reasoned explanation for its decision on a petitioner's federal claim," because "there is

[6] The Court refers to the unnumbered page following page 6 as page 6a.

nothing to which to defer"); *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000) ("Federal habeas review is not *de novo* when the state court does not supply reasoning for its decision, but an independent review of the record is required to determine whether the state court clearly erred in its application of controlling federal law. [Citation omitted.] Only by that examination may we determine whether the state court's decision was objectively reasonable.").

DISCUSSION

I. RESPONDENTS HAVE NOT SHOWN THAT PETITIONER'S CLAIMS ARE DEFAULTED.

As a preliminary matter, Respondents argue that Petitioner's claims are procedurally defaulted because the California Supreme Court cited *In re Dixon*, 41 Cal.2d 756 (1953) in denying Petitioner's state habeas petition. The Court cannot agree. The California court's citation to *Dixon* is unclear and does not specify which claims are defaulted; even Respondents concede that the opinion merely "does not *appear* to be a denial on the merits." (Return at 4) (emphasis added). In order to invoke a procedural bar sufficient to deny federal review, a state court must make a clear statement that the petitioner's claim is being denied on state procedural grounds. *McKenna v. McDaniel*, 65 F.3d 1483, 1488 (9th Cir. 1995); *Hill v. Roe*, __ F.3d ___, 2002 WL 1733643 at *1 (9th Cir. Jul. 29, 2002).

In addition, the state has not met its burden by showing that *Dixon* is a state procedural bar that is independent of federal law and inadequate to deny review. *See Hill*, 2002 WL 1733643 at *2; *Bennett v. Mueller*, ___

F.3d ___, 2002 WL 1461634 at *7-*9 (9th Cir. July 9, 2002); *see also Park v. California*, 202 F.3d 1146, 1151 (9th Cir. 2000) (*Dixon* bar has been applied inadequately in the past). Respondents simply have presented no evidence on the matter

Thus, the Court does not find Petitioner's claims are defaulted. The Court will proceed to the merits of his claims.

II. PETITIONER'S STATE LAW CLAIMS ARE NOT COGNIZABLE.

In Grounds One, Two, Four, Five, Eight, and Nine, Petitioner argues that his conviction cannot stand because of various violations of California law. None of these claims is cognizable on federal habeas review.

Federal courts may only grant a Writ of Habeas Corpus if the petitioner's conviction or sentence is in "violation of the Constitution or laws or treatises of the United States." 28 U.S.C. § 2254(a). Mere errors in the application of state law are not cognizable on habeas corpus. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) ("[F]ederal habeas corpus relief does not lie for errors of state law.").

Federal courts will only grant relief for a state-law error if that error "so fatally infected the proceedings as to render them fundamentally unfair" and thereby violated a petitioner's federal constitutional right to due process. *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991) ("We are not a state supreme court of errors; . . . The issue for us, always, is whether the state proceedings

satisfied due process; the presence or absence of a state law violation is largely beside the point.").

Petitioner argues that the state law violations in his case amount to a denial of due process. (Traverse at 13-14). The Court disagrees. In order to show a violation of due process, Petitioner must show that the state proceedings was "fundamentally unfair." *Jamal*, 826 F.2d at 920. Petitioner has not done so.

His claim that the criminal Complaint was filed one day late does not render the proceeding fundamentally unfair. This was a minor deviation from state procedure that did not prejudice Petitioner in any way. His claim that the Complaint was unverified is unsupported by any evidence, and, in fact, directly contrary to the record. (*See* RT at 18, 22). Even if true, nothing in the record suggests Petitioner did not receive a fair trial. His claim that the California court refused to take judicial notice of California and federal law is also contrary to the record. (*See* RT at 119-20). Petitioner's complaint that the trial judge improperly refused to recuse himself because Petitioner appeared before him in another case is rejected in light of the Court's finding that the judge was not biased against Petitioner (*see infra* Section IV.). The Court also rejects Petitioner's allegation of improper arrest. California Vehicle Code Section 40300.5 provides that a peace officer may, without a warrant, arrest a person when the officer has reasonable cause to believe that the person had been driving while under the influence of an alcoholic beverage, when the person may cause injury to himself or herself, or damage property unless immediately arrested. Cal. Vehicle Code § 40300.5(d). Here, the evidence establishes that the officer had reasonable cause to arrest Petitioner without a warrant. Finally, Petitioner's claim that the

proceeding was fundamentally unfair because the state court took too long to reject his state habeas petition is without merit, because this minor delay was not unfair and Petitioner does not establish that he was prejudiced.

Petitioner also makes a lengthy argument that the lack of a verified complaint deprived the California court of jurisdiction. This claim is contrary to the record: the state judge found that the Complaint was properly verified. (RT 18, 22). Even if it had not been, Petitioner has not shown that the requirement for a verified complaint was a jurisdictional requirement in state court. *See* Cal. Penal Code, § 960 ("No accusatory pleading is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not prejudice a substantial right of the defendant upon the merits.").

At Petitioner's trial, the government presented evidence that Petitioner was stopped by a highway patrol officer after driving erratically, exhibited visible signs of intoxication, failed several field sobriety tests, and was arrested. His blood contained .12% alcohol by weight. Petitioner cross-examined the witnesses against him and presented evidence and argument on his own behalf. There is no basis upon which to conclude that Petitioner's trial was unfair. These claims are without any merit.

III. THERE WAS NO SPEEDY TRIAL VIOLATION.

Construed liberally, Ground One of the Petition also raises the claim that the state violated Petitioner's federal right to a speedy trial. This claim lacks merit.

State statutes governing the timing of criminal pretrial and trial procedures do not define the contours of a petitioner's Sixth Amendment right to a speedy trial. *Wells v. Petsock*, 941 F.2d 253, 256 (9\3d Cir. 1991), *cert. denied*, 505 U.S. 1223 (1992). Instead, this Court looks to federal law to decide Petitioner's claim.

The first question the Court must ask is whether the length of delay before trial was uncommonly long. *United States v. Aguirre*, 994 F.2d 1454, 1455 (9th Cir.), *cert. denied*, 510 U.S. 1029 (1993). An uncommonly long delay is a threshold requirement for a speedy trial claim, unless the length of delay is presumptively prejudicial, Petitioner's claim cannot have merit. *See Doggett v. United States*, 505 U.S. 647, 651-52 (1992); *Barker v. Wingo*, 407 U.S. 513, 530 (1972); *United States v. Beamon*, 992 F.2d 1009, 1012 (9th Cir. 1993). Whether the length of delay is presumptively prejudicial depends on the peculiar circumstances of each case. *Barker*, 402 U.S. at 530-31.

In Petitioner's case, the delay was not unreasonably long. Petitioner was arrested in the early morning hours of August 14, 1999. He was released on bail August 18. (Return, Exh. 1 at 1). The formal Complaint was filed September 10 and Petitioner had a hearing on September 13. (*Id.*). At that hearing, Petitioner requested a continuance until October 13, and waived his right to a speedy trial. (*Id.*).

At the October 13th hearing, the commissioner presiding over the matter recused himself.[7] (Return, Exh. 1 at 2).

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[7] The record does not reflect the reason for the recusal.

Petitioner again waived his right to a speedy trial, and the case was re-set for November 3. (*Id.*). On that date, Petitioner requested yet another continuance, until November 24. (*Id.*).

At the November 24th hearing, Petitioner apparently demanded he be allowed to represent himself, but refused to fill out a waiver of rights and refused to answer any of the court's inquiries about his decision to reject representation. (Return, Exh.. 1 at 3). The court continued the matter until November 29. (*Id.*). A public defender was appointed on that date, but Petitioner continued to file documents stating that he wanted to represent himself. (Return, Exh. 1 at 3). The case was continued until the next day. On November 30, the court relieved the public defender and allowed Petitioner to represent himself. (Return, Exh. 1 at 4). Petitioner refused to enter a plea, and the court entered a plea of "not guilty" on his behalf. (*Id.*). Petitioner's trial went forward on December 17. (Return, Exh. 1 at 7-8).

This was not an unreasonable delay. Petitioner waived his right to a speedy trial through November 24, 1999. His trial went forward approximately three weeks later. The Speedy Trial Clause protects those who assert their rights and not those who acquiesce in the delay. *Aguirre*, 994 F.2d at 1457. Thus, Petitioner cannot claim his rights were violated for the period prior to November 24, because he waived his rights and both agreed to and requested the delay.

The Court finds that the three-week period at the end of Petitioner's time waiver was not unreasonably long, particularly in light of the fact that it was Petitioner's own obstreperous refusal to answer the trial court's questions

regarding self-representation that was the substantial cause of the delay. The Court also notes that Petitioner was not in custody during the delay and that the delay did not appear to prejudice Petitioner or provide any tactical advantage for the government. In fact, Petitioner used the time to file numerous pre-trial motions. (Return, Exh. 1 at 4-7). This ground has no merit.

IV. THE TRIAL JUDGE WAS NOT BIASED AND DID NOT COMMIT MISCONDUCT.

In Ground Five, Petitioner argues that his due process rights were violated because his trial judge was biased against him. This claim is meritless.

A criminal defendant is guaranteed the right to an impartial judge. *Lang v. Callahan*, 788 F.2d 1416, 1418 (9th Cir. 1986). The Due Process Clause of the Constitution clearly requires a "fair trial in a fair tribunal" before a judge with no actual bias against the defendant or interest in the outcome of his or her particular case. *Bracy v. Gramley*, 520 U.S. 899, 904 (1997). A trial judge must always remain fair and impartial, and "must . . . avoid even the appearance of advocacy or partiality." *Kennedy v. Los Angeles Police Dep't*, 901 F.2d 702, 709 (9th Cir. 1989).

However, a trial judge is more than simply an umpire or referee. It is perfectly appropriate for a judge to participate in the examination of witnesses to clarify evidence, confine counsel to evidentiary rulings, ensure the orderly presentation of evidence, and prevent undue repetition. *Duckett v. Godinez*, 67 F.3d 734, 739 (9th Cir. 1995). A claim of judicial misconduct by a state judge does not entitle a petitioner to habeas relief unless "the state trial judge's behavior rendered the trial so fundamentally

unfair as to violate federal due process under the United States Constitution." *Duckett*, 67 F.3d at 740. To sustain a claim of judicial misconduct on habeas review, there must be an "extremely high level of interference" by the trial judge which creates a "pervasive climate of partiality and unfairness." *Id.*, *see also*, *United States v. DeLuca*, 692 F.2d 1277, 1282 (9th Cir. 1982).

Petitioner has not shown bias even remotely approaching this level. In fact, the Court's review of the transcript shows that the trial judge went out of his way to assist the Petitioner in understanding the law applicable to his case, properly submitting his evidence, and avoiding objections. (*See*, *e.g.*, RT at 58, 64, 72, 85, 91, 100, 104, 140). The judge also overruled numerous government objections during Petitioner's case. (*See*, *e.g.*, RT at 51, 55, 91, 189). Finally, the Court notes that at some points the judge took over the questioning and elicited evidence helpful to Petitioner's case. (*See*, *e.g.*, RT at 62, 72). Thus, the record demonstrates that the trial judge was not vindictive or biased against Petitioner.

Petitioner also argues that the judge was biased because he denied most of Petitioner's pre-trial motions. Thus [sic] does not establish bias. The judge denied most of the motions because they were without merit. Petitioner argues at great length that the motions could not be denied because they were unopposed. However, the fact that the motions were unopposed does not make them meritorious. The trial court considered each motion, and stated its reasons for denying the ones that were meritless. "Judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Litesky v. United States*, 510 U.S. 540, 555 (1994). Petitioner has not shown that the trial judge was biased against him in any way.

Petitioner points out that the judge had presided over a previous case involving Petitioner. In the prior case, Petitioner was charged with driving a boat while intoxicated, but the government moved to dismiss the charges when it was unable to produce a necessary witness. (RT at 31). The judge dismissed the case, but assessed Petitioner a $600 fee for services of the public defender. (*Id.*). However, the trial judge acknowledged the prior case and found it would not affect his adjudication of Petitioner's current case. (RT 32). Finally, Petitioner argues that judicial bias was "flagrantly obvious" when the trial court refused to take judicial notice of controlling federal law. (Traverse at 19). Petitioner points to 18 U.S.C. § 31, which defines the term "motor vehicle," for purposes of that section, as a commercial vehicle used on the highways. Petitioner apparently contends that this definition is controlling federal authority that applies to the states. Petitioner is mistaken. By its terms, that statute applies only to crimes defined elsewhere in Chapter 2 of Title 18. *See* 18 U.S.C. § 31(a). States are free to create their own definitions of "motor vehicle" through their statutory or case law. U.S. Const., amend. X; *Columbus v. Ours Garage & Wrecker Svc., Inc.*, ___ U.S. ___, 122 S.Ct. 2226, 2232 ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress."); *cf. Sturgis v. Crowninshield*, 17 U.S. 122, 126-28 (1819).

Contradicting his own argument, Petitioner also apparently claims the trial court accepted Section 31 as

controlling law, but incorrectly found that his vehicle met the definition in Section 31.[8] Notwithstanding the fact that this would be irrelevant, Petitioner's claim is contrary to the record. In fact, the trial court denied Petitioner's request for notice of federal law after finding that Petitioner's car did *not* meet the definition of "motor vehicle" under federal law, because it was not a truck and not used for commercial purposes, so federal law was not controlling. (RT 21).

Petitioner has failed to show that the state judge was biased against him or acted unfairly. Petitioner's claim in Ground Five has no merit.

V. THERE WAS SUFFICIENT EVIDENCE FOR CONVICTION.

Petitioner claims in Ground Six that there was insufficient evidence to support his conviction. Specifically, Petitioner argues that the court's finding that he violated CVC § 23612 when he unlawfully refused to submit to a chemical test (a special allegation related to the conviction in Count II for driving with a BAC of-.08 or higher) was unsupported, because the government never introduced evidence that Petitioner had a valid driver's license.

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[8] Petitioner, who refers to himself in the plural throughout his pleadings, argued that the judge "determine[d] that [Petitioner] was in a truck and that it was commercial and a Jaguar!! Excuse us? A Jaguar TRUCK? WE DON'T THINK SO! COMMERCIAL VEHICLE? NOT HARDLY!" (Traverse at 19)(emphasis in original). The Court takes this to mean that Petitioner argues his car did not actually meet the definition in § 31.

This claim is not cognizable on federal habeas review. The Court does not have jurisdiction over a habeas corpus petition unless the petitioner seeks relief from custody. 28 U.S.C. § 2241; *Maleng v. Cook*, 490 U.S. 488, 490 (1968). The only penalties that can result from a violation of CVC § 23612 are a fine and revocation of driving privileges. (Cal. Vehicle Code, § 23612(a)(1)(D)).[9] Fines are not "custody" for purposes of federal habeas review. *United States v. Kramer*, 195 F.3D 1129, 1130 (9th Cir. 1999). Similarly, loss of a driver's license is not "custody." *Williamson v. Gregoire*, 151 F.3d 1180, 1184 (9th Cir. 1998), *cert. denied*, 525 U.S. 1081 (1999). Thus, the Court does not have jurisdiction to hear this claim.[10]

Even if Petitioner's claim were cognizable, it is meritless. A habeas petitioner challenging sufficiency of the evidence for his state criminal conviction "is entitled to habeas corpus relief if it is found that upon the evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). "The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* At 319; *see also*, *Schell v. Witek*, 218 F.3d 1017, 1023 (9th Cir. 2000). If the record

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[9] The state records do not reflect what part of Petitioner's sentence was due to the special enhancement.

[10] The special enhancement also prevented Petitioner from receiving a grant of summary probation after being convicted of Counts I and II, but Petitioner does not contend that the evidence was insufficient on those counts.

supports conflicting inferences, the Court "must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 325; *see also*, *Wright v. West*, 505 U.S. 277, 296 (1992) (plurality opinion); *Schell*, 218 F.3d at 1023.

In this case, Petitioner argues that because the government never introduced evidence that Petitioner held a valid driver's license, there was insufficient proof that he had previously agreed to have his blood tested if arrested for driving under the influence. Petitioner contends that without such an agreement, he cannot be convicted for refusing to have his blood tested. This argument lacks merit because the state is not required to show that a driver has a valid driver's license in order to charge the enhancement:

> *Any person who drives a motor vehicle* is deemed to have given his or her consent to chemical testing of his or her blood or breath for the purpose of determining the alcoholic content of his or her blood, if lawfully arrested for any offense allegedly committed in violation of Section 23140, 23152, or 23153.

(Cal. Veh. Code, § 23612(a)(1)(A)) (emphasis added). Petitioner was lawfully arrested for violations of Section 23152 (driving while under the influence, and driving with a BAC of .08 or higher). Thus, he was deemed by law to have consented to the blood test. There is no requirement that he have a driver's license; the state need only prove that he was driving a motor vehicle. Officer McEwen testified that Petitioner was driving a 1986 Jaguar XJ6 when he was pulled over, and Petitioner does not contest that fact.

Thus, the government easily met its burden of proof. Ground Six fails.

VI. PETITIONER'S FOURTH AMENDMENT CLAIM IS NOT COGNIZABLE.

In Ground Seven, Petitioner argues that the forced blood draw violated his Fourth Amendment right to be free from unreasonable searches and seizures. This claim is not cognizable.

Claims of illegal search and seizure are not cognizable on federal habeas review unless the state courts denied the petitioner a full and fair hearing on the Fourth Amendment issues he raises in his federal claim. *Stone v. Powell*, 428 U.S. 465, 494 (1976). Where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."). This is true even if the petitioner does not personally take advantage of the opportunity to be heard and even if the state court came to the wrong result. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9th Cir. 1996) ("The relevant inquiry is whether petitioner had the opportunity to litigate his claim, not whether he did in fact do so or even whether the claim was correctly decided.").

Petitioner had a full and fair opportunity to litigate his claim at the state level. He moved to suppress the blood evidence, and the state court heard evidence from a police officer who was present at the blood draw and the nurse who actually drew Petitioner's blood. Petitioner cross-examined both witnesses at great length, and the

trial court agreed that he brought out some discrepancies in their testimony. Petitioner also presented a witness of his own who testified about the normal procedure for drawing blood. After hearing all of this evidence, the court determined that "the procedures used by the officers and by the nurse to draw [Petitioners][blood against [his] consent [sic] were constitutionally sound" and that there was "no violation" of the Fourth Amendment. (RT 205). Thus, Petitioner had a full and fair hearing on his Fourth Amendment claim and cannot raise it anew in a federal habeas petition. *Stone*, 428 U.S. at 494.

VII. PETITIONER'S FIFTH AMENDMENT RIGHTS WERE NOT VIOLATED.

Petitioner also argues in Ground Seven that the forced production of blood violated his Fifth Amendment right against self-incrimination. This claim has no merit. The Fifth Amendment protects a defendant from providing incriminating *testimony*. *Holt v. United States*, 218 U.S. 245, 252-53 (1910) ("[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."). It does not prevent the government from using a defendant's physical characteristics as evidence against him, including the contents of his blood. *Id.*; *Schmerber v. California*, 384 U.S. 757, 765 (1966) (forced blood draw cannot violate Fifth Amendment). This claim has no merit.

VIII. GROUNDS TEN AND ELEVEN FAIL TO STATE A FEDERAL QUESTION.

In Ground Ten, Petitioner complains that the California Supreme Court and Court of Appeal failed to reverse the California Superior Court's denial of his state habeas petition. In Ground Eleven, Petitioner states that he has sought relief in every possible state court on all grounds alleged in the Petition. Although these issues are certainly relevant top [sic] the exhaustion of his claims, they are not in and of themselves violations of the laws or Constitution of the United States. *See supra* Section II. In fact, these statements do not even allege any particular error in his conviction or sentence. As such, they do not present issues which are cognizable on federal habeas review.

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered denying the Petition for Writ of Habeas Corpus and dismissing this action with prejudice.

DATED: August 9, 2002

/s/ _____
JENNIFER T. LUM
UNITED STATES
MAGISTRATE JUDGE